LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
AUG 2 1 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 34

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

v.

BRUCE A. MACKEY, individually, and TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONER.

WALTER J. ROCKLER
120 South La Salle Street
Chicago 3, Illinois
Counsel for the Petitioner.

LEO H. ARNOLDSEN
HERBERT E. RUBEN
Of Counsel.

The Saturday Press, Inc.—Baltimore, Md.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	3
Statement of the Case	5
Summary of the Argument	7
Argument:	
I. Both the language and the history of Rule 54(b) support the view that the Rule does not and was not intended to permit the district courts conclusively to fix appellate jurisdiction	10
A. Congressional enactments have set a standard of "final decisions" for federal appellate jurisdiction	11
B. The original Rule 54(b) simply allowed an application of the Congressional requirements to multiple claims cases	13
C. The amendment to Rule 54(b) was intended to indicate clearly the time at which, in the view of the district court, an appeal should be taken	15
D. The language of Rule 54(b) as amended does not confer on the district courts power to decide appellate jurisdiction	20
E. The amended Rule affects also the jurisdiction of the Supreme Court, which has consistently rejected the view that a lower court may control the jurisdiction of an upper court	25
II. If, under Rule 54(b), a district court judge's order were "final" and beyond review, the Rule would exceed the rule-making power of the Su-	

PAGE

preme Court and would be invalid as a violation of Congressional statutes and the Constitution of the United States 28

III. The interpretation of Rule 54(b) as a rule fixing appellate jurisdiction does violence to orderly appellate procedure and creates as many problems of judicial administration as it resolves .. 37

IV. The solution to difficult problems of appellate jurisdiction requires statutory action rather than tinkering with the Federal Rules 46

Conclusion 50

CITATIONS.

CASES:

Ace Grain Co. v. American Eagle Fire Insurance Co., 11 Fed. Rules Dec. 164 42

Allen Calculators, Inc. v. Nat. Cash Reg. Co., 322 U.S. 137 25

American Machine & Metals v. DeBothezat, 173 F. 2d 890 47

Arnold v. United States, 263 U.S. 427 12

AudiVision Inc. v. RCA Mfg. Co., 136 F. 2d 621 ..... 12, 14, 15, 16, 30, 47

Austrian v. Williams, 198 F. 2d 697, affirmed 331 U.S. 642 45

Baltimore Contractors v. Bodinger, 348 U.S. 176 ..... 11, 46, 47, 49

Banco Mexicano v. Deutsche Bank, 263 U.S. 591 18

Bank of the United States v. Halstead, 10 Wheat. 51 29

Bendix Aviation Corp. v. Glass, 195 F. 2d 267 ..... 10, 12, 23, 27, 28, 34, 41

Boston Medical Supply Co. v. Lea & Febiger, 195 F. 2d 853 38

PAGE

Brandt v. Renfield Importers, 216 F. 2d 206 23

Burkhart v. United States, 210 F. 2d 602 23

Butler v. Ungerleider, 187 F. 2d 238 18

Cantor v. American and Ocean Insurance Companies, 3 Pet. 307 11

Cary v. Curtis, 3 How. 236 29

Catlin v. United States, 324 U.S. 229 11

Clark v. Taylor, 163 F. 2d 940 ..... 15, 47

Town of Clarksville, Va. v. United States, 198 F. 2d 238, certiorari denied 344 U.S. 957 ..... 39, 41

Cobbledick v. United States, 309 U.S. 323 ..... 11, 45

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 ..... 13, 38

Collins v. Miller, 252 U.S. 364 ..... 12, 13, 30

Covington v. First National Bank, 185 U.S. 270 ..... 12, 23

Creel v. Creel, 184 F. 2d 449 18

Cutting Room Appliances Corp. v. Empire Cutting M. Co., 186 F. 2d 997 38

David v. District of Columbia, 187 F. 2d 204 22

Davidson Bros. Marble Company v. United States, 213 U.S. 10 30

Department of Banking v. Pink, 317 U.S. 264 26

Dickinson v. Petroleum Corp., 338 U.S. 507 ..... 12, 16, 17, 18, 23, 47

Dille v. Carter Oil Co., 174 F. 2d 318, certiorari denied 338 U.S. 850 45

District 65 v. McKague, 216 F. 2d 153 ..... 43, 44

Drittel v. Friedman, 154 F. 2d 653 45

PAGE

E. I. DuPont de Nemours Company, Inc. v. Hall, 220 F. 2d 514 45

Dutton v. Cities Service Defense Corp., 197 F. 2d 458 .. 45

Etten v. Kauffman, 179 F. 2d 302, certiorari denied 340 U.S. 931 ..... 22, 43

Flegenheimer v. General Mills, 191 F. 2d 237 ..... 10, 21, 22, 27, 32

Ford Motor Co. v. Busam Motor Sales, 185 F. 2d 531 45

Forgay v. Conrad, 6 How. 201 37

Georgia Railway and Power Co. v. Decatur, 262 U.S. 432 26

Gold Seal v. Weeks, 209 F. 2d 802 ..... 39, 41

Gospel Army v. Los Angeles, 331 U.S. 543 26

Hardy v. Bankers Life & Cas. Co., 222 F. 2d 827 39

Hart v. Knox County, Tenn., 171 F. 2d 45 34

Hohorst v. Hamburg-American Packet Co., 148 U.S. 262 13

Holcombe v. McKusick, 20 How. 552 26

Hook v. Hook & Ackerman, Inc., 213 F. 2d 122 ..... 38, 45

Hudson v. Parker, 156 U.S. 277 30

Hunteman v. New Orleans Public Service, 119 F. 2d 465, certiorari denied 314 U.S. 647 32

Hydraulic Press Mfg. Co. v. Moore, 185 F. 2d 800 45

Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286 41

Kanatser v. Chrysler Corp., 195 F. 2d 104, certiorari denied 344 U.S. 921 ..... 42, 45

Kline v. Burke Construction Co., 260 U.S. 226 29

Labor Board v. Jones & Laughlin, 301 U.S. 1 28

PAGE

Leonidakis v. International Telecoin Corp., 208 F. 2d 934 ..... 39, 41

Libby, McNeill & Libby v. Alaska Industrial Board, 215 F. 2d 781 42

Libby-Owens-Ford Glass Co. v. Sylvania Indust. Corp., 154 F. 2d 814, certiorari denied 328 U.S. 859 15

The Life and Fire Insurance Co. of New York v. Adams, 9 Pet. 573 12

Long v. Davis, 169 F. 2d 982 45

Lopinsky v. Hertz Drive-Ur-Self Systems, 194 F. 2d 422 ..... 35, 36

Lyman v. Remington Rand, 188 F. 2d 306 43

Mackenzie v. Hare, 239 U.S. 299 20

Mackey v. Sears, Roebuck and Co., 218 F. 2d 295 ..... 25, 33

Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379 30

Market Street R. Co. v. Railroad Com. of Calif., 324 U.S. 548 ..... 12, 26

Morgantown v. Royal Ins. Co., 337 U.S. 254 47

Munson Line v. Green, 165 F. 2d 321 15

National Association of Real Estate Boards v. United States, 176 F. 2d 631, reversed on other grounds 339 U.S. 485 25

Newburgh Moire Company v. Superior Moire Company, 218 F. 2d 580 44

O'Malley v. Chrysler Corporation, 160 F. 2d 35 45

Pabellon v. Grace Line, 191 F. 2d 169, certiorari denied 342 U.S. 893 ..... 10, 19, 31, 35, 42, 47

Packard Motor Car Co. v. Gem Mfg. Co., 187 F. 2d 65, certiorari dismissed 342 U.S. 802 38

Paducah v. Tennessee Telegraph Co., 229 U.S. 476 ..... 12, 23

Palmuth v. United States, 107 F. 2d 975, affirmed 309 U.S. 323 45

PAGE

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 37

Rao v. Port of New York Authority, 222 F. 2d 362 39

Raytheon Mfg. Co. v. Radio Corp. of America, 76 F. 2d 943, affirmed 296 U.S. 459 30

Rector v. United States, 20 F. 2d 845 ..... 12, 16, 23

Reeves v. Beardall, 316 U.S. 283 ..... 14, 40, 41

Republic of China v. American Express Co., 190 F. 2d 334 ..... 12, 23

Republic Iron & Steel Co. v. Youngstown S. & T. Co., 272 Fed. 386 30

Republic of Italy v. DeAngelis, 206 F. 2d 121 38

Richfield Oil Corp. v. State Board, 329 U.S. 69 26

Rieser v. Baltimore & Ohio R. Co. —— F. 2d ——, 21 Fed. Rules Serv. 54b.4, Case 5 ..... 10, 35, 46, 48

Roberts v. American Newspaper Guild, 188 F. 2d 650 43

Schooner Paulina's Cargo v. United States, 7 Cranch 52 20

Sheldon v. Sill, 8 How. 441 29

Sheppy v. Stevens, 200 Fed. 946 13

Sibbach v. Wilson & Co., 312 U.S. 1 ..... 30, 32

Steiner v. 20th Century-Fox Film Corporation, 220 F. 2d 105 39

Swift & Co. v. Compania Caribe, 339 U.S. 684 38

Tomlinson v. Poller, 220 F. 2d 308 30

Toomey v. Toomey, 149 F. 2d 19 15

Turner v. Bank of North America, 4 Dall. 8 29

United States v. California Co-op Canneries, 279 U.S. 553 25

United States v. Curran, 18 F. 2d 953 30

PAGE

United States v. Fallbrook Public Utilities Dist., 109 F. Supp. 28 23

United States v. Hayes, 172 F. 2d 677 45

United States v. Hudson and Goodwin, 7 Cranch 32 29

United States v. River Rouge Co., 269 U.S. 411 .....13, 14

United States v. Sherwood, 312 U.S. 584 .....30, 32

United States v. Tinkoff, 153 F. 2d 106, certiorari denied 329 U.S. 740 30

United States v. Wrightwood Dairy Co., 315 U.S. 110 18

United States Plywood Corp. v. Hudson Lumber Co., 210 F. 2d 462 39

Vale v. Bonnett, 191 F. 2d 334 .....38, 43

Wash'n-Southern Co. v. Baltimore Co., 263 U.S. 629 .....28, 30, 31, 32, 33

Wayman v. Southard, 10 Wheat. 1 29

Winsor v. Daumit, 179 F. 2d 475 22

Wright v. Gibson, 128 F. 2d 865 15

Zalkind v. Scheinman, 139 F. 2d 895 47

CONSTITUTION:

Constitution of the United States
Article I, Section 8 29
Article III, Section 1 28

STATUTES:

Conformity Act of 1872, 17 Stat. 196 13

Expediting Act of 1903, 32 Stat. 823 25

First Judiciary Act of 1789, 1 Stat. 73 11

PAGE

United States Code:
Title 15:
§ 28-29 ..... 21, 25, 31
Title 28:
§ 1254(1) 2
§ 1257 26
§ 1291 ..... 3, 11, 21, 30, 31, 34, 36, 38
§ 1292 38
§ 1332 5
§ 2072 ..... 3, 31-32, 35
Title 47:
§ 401(d) 25, 31
Title 49:
§ 44-45 ..... 21, 25, 31

Federal Rules of Civil Procedure:
Draft Rule 63(b) 18, 22
Rule 54(b) (as originally promulgated 1938) 3, 13, 14, 17, 19
Rule 54(b) (as amended effective 1948) 4, 8, 9, 10, 15, 17, 18, 20, 21, 22, 24, 25, 27, 30, 31, 33, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 49, 50
Rule 73(a) 33, 34
Rule 82 ..... 4, 32

MISCELLANEOUS:
100 Congressional Record 1079, 1168 (1954) 49
Crick, The Final Judgment Rule, 41 Yale L. Journ. 539 (1932) 47
The Federalist, No. 81 11
Maine, Early Law and Custom 9
Miscellaneous Documents and Correspondence of the Advisory Committee 19
3 Moore, Federal Practice (1st ed. 1952 Cum. Supp.) ¶ 54.02 38

PAGE

6 Moore, Federal Practice (2d ed. 1953)
¶ 54.01 16
¶ 54.21 19
¶ 54.26 15
¶ 54.28 26
¶ 54.29 36
¶ 54.31 38
¶ 54.32 38
¶ 54.43 ..... 36, 37, 44, 47, 48

Moore & Vestal, Federal Appellate Procedure, 35 Va. L. Rev. 1 (1949) 16, 47

Note, 28 N. Y. U L. Rev. 203 (1953) 47

Notes of the Advisory Committee
Rule 54(b) 15, 16
Rule 73(a) 33, 34
Rule 82 ..... 4, 32

Preliminary Draft of Rules of Civil Procedure (May 1936) 19

Report of Advisory Committee on Rules for Civil Procedure (April 1937) 19

Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, September 24-25, 1953, Washington, D. C. 47-48

Report of Proposed Amendments to Rules of Civil Procedure (1946) 15

Stern & Gressman, Supreme Court Practice, (2d ed. 1954) 24, 27

Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Probs. 216 (1948) 48

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 34

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

v.

BRUCE A. MACKEY, individually, and TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The memorandum opinion of the District Court is set forth at pages 20-34 of the printed Record.[1] The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 218 F. 2d 295, and is also reprinted at R. 40-46.

---

[1] Hereinafter "R" will designate the printed Transcript of Record from the Court below.

JURISDICTION.

The order of the Court of Appeals was entered on January 18, 1955 (R. 47). A petition for a writ of certiorari was filed on February 24, 1955, and was granted on March 28, 1955 (R. 47). The jurisdiction of this Court rests upon 28 U.S.C. Section 1254 (1), 62 Stat. 928 (1948).

QUESTIONS PRESENTED.

The following questions are presented:

(1) Does the dismissal of parts of a complaint by a district court judge with an express direction that a final order is being entered and an express determination that there is no just reason for delay, pursuant to Rule 54(b) as amended of the Federal Rules of Civil Procedure, automatically and conclusively create an appealable decision beyond review by the Court of Appeals to determine its own jurisdiction?

(2) If Rule 54(b) is construed so that the district court's order controls the determination of finality for purposes of appellate jurisdiction, does the Rule exceed the rule-making power of the Supreme Court of the United States in that it revises and modifies the requirements for jurisdiction of the Courts of Appeals set forth in Section 1291 of Title 28 of the United States Code?

STATUTES AND RULES INVOLVED

United States Code, Title 28 (Judiciary and Judicial Procedure):

Section 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court.

Section 2072. Rules of civil procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

* * *

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Federal Rules of Civil Procedure:

Rule 54. Judgments; Costs. (as originally promulgated, effective September 16, 1938)

* * *

(b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate

the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Rule 54. Judgment; Costs. (as amended December 27, 1946, effective March 19, 1948)

* * *

(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

Rule 82. Jurisdiction and Venue Unaffected.

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

STATEMENT OF THE CASE.

The respondents, an individual residing in Illinois and an Illinois corporation wholly-owned by the individual, filed a complaint (R. 2-11) containing six counts against the petitioner, a New York corporation, in the United States District Court for the Northern District of Illinois, Eastern Division, on May 21, 1953. The jurisdiction of the District Court was invoked as to certain counts because of alleged violation of federal antitrust and patent laws; jurisdiction was invoked as to other, common law counts upon the ground of diversity of citizenship, under 28 U.S.C. 1332, the amount in controversy being in excess of $3,000.

In essence the complaint alleged that the petitioner had over a period of years since 1949 engaged in a planned course of conduct designed to drive the individual respondent out of any and all business ventures in which he was engaged, evidenced by overt conduct set forth in some half dozen allegations. By realleging these allegations singly and in combination, the respondents purported to state a variety of causes of action including violations of the antitrust laws, common law unfair competition, and patent infringement.

Count I of the complaint (R. 2-8), in twenty-three paragraphs of allegations, set forth alleged violations of the Sherman, Robinson-Patman, and Clayton Acts, and demanded treble damages and equitable relief under Section 4 of the Clayton Act. Count II (R. 8) was apparently based on a common law theory of unfair competition involving destruction of a lamp business; Count III (R. 9) was based on a common law theory of interference with contractual relations; Count IV (R. 9), on theories of patent infringement and unfair competition; Count V (R. 9-10), on anti-

trust theories; and Count VI (R. 10-11), on a composite theory of an improper course of business conduct. Each allegation of Count I, except those contained in paragraphs 1 (R. 2) and 23 (R. 8) of Count I was utilized in, and formed the basis of, the other counts of the respondents' original complaint.

Acting upon the petitioner's motion, as amended, to dismiss parts of the complaint (R. 11-17, 18-20), the District Court dismissed Counts I, II, and parts of Count VI without leave to amend. (R. 34-36). The District Court also struck Count IV with leave to amend. The respondents themselves abandoned Count V, and subsequently filed an amended Count IV, to which the petitioner has answered. The parties are now at issue in the District Court on Counts III, IV (as amended) and VI.

The District Court entered its order dismissing parts of the complaint with a finding that there was no just reason for delay and expressly directed the entry of judgment, in the form specified in Rule 54(b). (R. 34-36). Thereafter, on June 8, 1954, the respondents appealed to the United States Court of Appeals for the Seventh Circuit from that part of the order of the District Court dismissing parts of the complaint without leave to amend. (R. 36-38). On November 15, 1954, the petitioner filed a motion to dismiss the appeal on the ground that the finality requisite to appellate jurisdiction was lacking, notwithstanding the entry of judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure. (R. 39). On January 18, 1955, the Court of Appeals denied the petitioner's motion to dismiss the appeal upon the sole ground that the district court judge's order, because made in accordance with Rule 54(b), was conclusive as to the jurisdiction of the Court of Appeals (R. 40, 46). 218 F. 2d 295, 299.

The Court explicitly refused to examine the question of statutory finality as an issue apart from the effect to be given Rule 54 (b):

> "In view of our decision it is not necessary to decide the point much discussed in the briefs as to whether the order and judgment entered herein would have been final and appealable prior to the 1948 Amendment of Rule 54(b)."

218 F. 2d 295, at p. 299; R. 40, at p. 46.

SUMMARY OF THE ARGUMENT.

The power and authority of the Supreme Court of the United States to make rules for the district courts is limited to procedural matters by the Enabling Act, other Congressional statutes, and Constitutional considerations. In consequence, the Federal Rules of Civil Procedure for the district courts deal simply with district court procedure. This tautology, given scant recognition by the Court below, is basic to the interpretation of the individual Rules.

A corollary to the fundamental limitation of power is that the Federal Rules of Civil Procedure do not regulate or determine the jurisdiction of the courts of appeals. This Court in promulgating the Rules denied any intention therein to determine or revise the rules of appellate jurisdiction. Congress legislated upon appellate jurisdiction long ago, and it has recently affirmed the wisdom of the enacted standards of jurisdiction by reiterating past requirements in the new Judiciary and Judicial Procedure Title of the United States Code.

Nor do the Federal Rules purport to reallocate judicial power between district courts and courts of appeals, or to reverse the hierarchical relationship between these systems of courts. Nothing in the Rules provides, as a general principle, that the district courts shall decide legal questions of any sort for the appellate courts.

What the Rules do not do in general, they have not done in particular in Rule 54(b). Rule 54(b) as amended does no more than provide that a decision cannot be final if the district court refuses to relinquish its grip on the matter. Relinquishment may be formally noticed and accomplished if the court finds no just reason for delay and directs entry of judgment. But if the district court indicates that it wishes to withhold its ultimate decision by not entering this kind of order, clearly the decision is not ripe for appeal or, in the language of the governing jurisdictional statute, is not final. On the other hand, if the district court does release its decision pursuant to a Rule 54(b) form of order, the appellate court may then proceed to examine the decision for *other* elements of *statutory* finality. The language of the Rule does not limit the appellate court's review.

An interpretation which would go further, giving the district court judge power to confer jurisdiction on the appellate courts automatically and conclusively, would make the Rule invalid because in violation of federal statutes and the Constitution. Merely labelling such conclusive action "procedural", or describing it as action which "incidentally" affects appellate jurisdiction, does not disguise the radical jurisdictional shift proposed; in fact, proponents of the "broad" interpretation expose the inadequacy of the camouflage by arguing at the same time that the whole purpose of Rule 54(b) as amended is to avoid difficult questions of appellate jurisdiction at the court of appeals level. Interpreted to grant district courts power to determine appellate authority, the Rule would be, as Judge Learned Hand describes it, a "strange anomaly" indeed, resulting in a curious inversion of customary judicial practice, whereby the characterizations of district court judges would bind not only the courts of appeals but also the Supreme Court of the United States on the most funda-

mental kind of review of all, that of the jurisdiction of the appellate court itself.

Apart from invalidating the Rule, the "broad" interpretation adds as many dilemmas to the problems of appellate jurisdiction as it is supposed to solve. This result, of simply varying the incidence of difficulties, is hardly surprising. The mechanical transfer of power to determine finality only evades the issues inherent in the finality test. Thus, a "positive" interpretation of Rule 54(b) leads, among other things, to a restatement of the question of "finality", as such, to one of whether "multiple claims" exist permitting a Rule 54(b) order at all. Furthermore, this interpretation provides and can provide no satisfactory method for dealing with a trial judge's abuse of discretion under Rule 54(b).

To the extent that serious problems of appellate jurisdiction undoubtedly exist, they are not resolved by a simple "talismanic" incantation which passes all control over appeals to trial court judges. The real problems may be dealt with, as numerous jurists and competent publicists have observed, by allowing a measure of discretion over appeals to the courts of appeals, and perhaps by allowing a limited certification of questions by the district courts. Legislation in these directions has been proposed to Congress and is now being considered. This is a far more promising, to say nothing of far more valid, method of dealing with appellate jurisdiction problems. From any point of view, there is little to be said for fundamentally altering appellate jurisdiction by alleged improvements "secreted in the interstices"[2] of rules of district court procedure.

---

[2] Sir Henry Maine's famous phrase, to describe the process by which rules of substantive law were tucked away in the Forms of Action, related of course to medieval practices in the evolution of the common law. See Maine, Early Law and Custom, p. 389 (1883).

ARGUMENT.

Preliminary Note.

The issues in this proceeding come to this Court thoroughly reviewed and analyzed in the opinions of the various courts of appeals which have taken a position. The petitioner has relied strongly upon the careful reasoning of Judge Learned Hand, set forth in *Flegenheimer* v. *General Mills,* 191 F. 2d 237 (2d Cir. 1951); Judge Frank, in concurring opinions in *Pabellon* v. *Grace Line,* 191 F. 2d 169, 176-181 (2d Cir. 1951), certiorari denied 342 U.S. 893, 96 L. Ed. 669 (1951), and *Rieser* v. *Baltimore & Ohio R. Co.,* —— F. 2d ——, 21 Fed. Rules Serv. 54b.4, Case 5 (2d Cir. June 9, 1955); and Judge Hastie, concurring in *Bendix Aviation Corp.* v. *Glass,* 195 F. 2d 267, 277-282 (3rd Cir. 1952).

I. Both the Language and the History of Rule 54(b) Support the View that the Rule Does Not and Was Not Intended to Permit the District Courts Conclusively to Fix Appellate Jurisdiction.

This Court has before it the question of the propriety of an appeal to a court of appeals from a district court, put in issue by a motion to dismiss the appeal. The Court of Appeals has held that it may not question the finality of an order issued in the form prescribed by Rule 54(b) of the Federal Rules of Civil Procedure. It is the petitioner's contention that Rule 54(b) is but a rule of procedure for the district courts and, reasonably interpreted, does not affect the power of the appellate courts to ascertain the factors necessary to their jurisdiction.

A. Congressional enactments have set a standard of "final decisions" for federal appellate jurisdiction.

To place the Rule in perspective, the statutory provision governing appellate jurisdiction, which long antedates the Rule, must be examined. Section 1291 of Title 28 of the United States Code grants to the courts of appeals "jurisdiction of appeals from all final decisions of district courts of the United States." In its requirement of finality, this provision reiterates a consistent standard for appellate review, which has been a part of the law since the First Judiciary Act of 1789 (1 Stat. 73).

The purposes of the test of finality have been variously expressed. In the words of Alexander Hamilton, Congress had reason to be concerned about an "unrestrained recourse to appeals, as a source of public and private nuisance." *The Federalist,* No. 81. A foremost objective of the jurisdictional statute has been to prevent piecemeal appeals on interlocutory matters, from the standpoint of avoiding both a clog on appellate dockets and delay and confusion in lower court proceedings. "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." Frankfurter, J., in *Cobbledick* v. *United States,* 309 U.S. 323, 325, 84 L. Ed. 783, 785 (1940). See also *Cantor* v. *American and Ocean Insurance Companies,* 3 Pet. 307, 318, 7 L. Ed. 688, 692 (1830); *Catlin* v. *United States,* 324 U.S. 229, 233-234, 89 L. Ed. 911, 916 (1945); *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176,

99 L. Ed. 171 (1955); *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621, 624-625 (2d Cir. 1943). Among its advantages, the final decision rule permits trial judges freely to correct their own errors before the matter passes out of their hands, and prevents consideration of an appeal on a part of a case when the perspective of the whole may be necessary and lacking. See *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 278 (3rd Cir. 1952).

Despite the numerous decisions and varying opinions in individual cases presenting the issue of finality, there has been a general consensus on the need for two distinct elements of finality: (1) the subject matter of the appeal must be put beyond the power and control of the trial court, *i.e.*, the trial court must exhaust its will to decide an issue; and (2) the decision must conclude the litigation as to a complete "judicial unit", whether that unit be the entire case or one phase of a case so separate, distinct and unrelated to any other phase that it, in effect, constitutes a separate case within a case. *Life & Fire Insurance Co. of New York* v. *Adams*, 9 Pet. 573, 9 L. Ed. 234 (1835); *Covington* v. *First National Bank*, 185 U.S. 270, 46 L. Ed. 906 (1902); *Paducah* v. *Tennessee Telegraph Co.*, 229 U.S. 476, 57 L. Ed. 1286 (1913); *Collins* v. *Miller*, 252 U.S. 364, 64 L. Ed. 616 (1920); *Arnold* v. *United States*, 263 U.S. 427, 68 L. Ed. 371 (1923); *Market Street R. Co.* v. *Railroad Com. of Calif.*, 324 U.S. 548, 551, 89 L. Ed. 1171, 1176 (1945); *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 94 L. Ed. 299 (1950); *Rector* v. *United States*, 20 F. 2d 845, 872 (8th Cir. 1927); *Republic of China* v. *American Express Co.*, 190 F. 2d 334, 338-339 (2d Cir. 1951); *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 278 (3rd Cir. 1952).

Before the promulgation of the Federal Rules in 1938, there was little room for dispute over the second element

of finality—the determination of a distinct judicial unit susceptible of independent decision. Except for certain special situations, the courts required that, to be "final," a decision must terminate the entire case in virtually every aspect as to all parties. See *Collins* v. *Miller*, 252 U.S. 364, 64 L. Ed. 616 (1920); *Sheppy* v. *Stevens*, 200 F. 2d 946 (2d Cir. 1912); *Hohorst* v. *Hamburg-American Packet Co.*, 148 U.S. 262, 37 L. Ed. 443 (1893). This construction of the statutory language stemmed from cases arising under the limited joinder of causes of action and parties ordinarily possible during the regime of the Conformity Act (Act of June 1, 1872, c. 255, 17 Stat. 196). Even under the pre-Rules procedure, however, there was a recognition of the possibility that one part of an action might be so separate and distinct from the rest that it formed an appropriate judicial unit for final decision and appeal. See *United States* v. *River Rouge Co.*, 269 U.S. 411, 70 L. Ed. 339 (1926); *Collins* v. *Miller*, *supra*, at pp. 370-371 (L. Ed. at p. 616); *Cf. Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528 (1949).

B. The original Rule 54(b) simply allowed an application of the Congressional requirements to multiple claims cases.

With the adoption of the Federal Rules of Civil Procedure, federal practice changed to permit the liberal joinder of claims and parties, the pleading of a variety of counterclaims and cross-claims, and the use of impleaders, intervenors, and separate trials upon a single complaint. The new liberality in practice and procedure now admitted the ready possibility that a trial court was dealing with several distinct justiciable units, and original Rule 54(b) was devised to regulate the entry in the district courts of judgments which *might* be final for some

but not all judicial units. This original Rule read as follows:

> "*Judgment at Various Stages.* When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

In litigation that followed upon the promulgation of the original Rule, appeals were permitted only in those multiple claims cases where final decisions upon separate judicial units had been rendered. The validity of the Rule was upheld by the courts of appeals and finally by the Supreme Court in *Reeves* v. *Beardall*, 316 U.S. 283, 86 L. Ed. 1478 (1942). As this Court said in the *Reeves* case, the Rule simply made it clear that "differing occurrences or transactions * * * form the basis of separate units of judicial action," as to which final decision might be rendered. 316 U.S. at p. 285, 86 L. Ed., at p. 1480.

This development of the final decision requirement under the original Rule 54(b) amounted to no more than a general application of the principle of *United States* v. *River Rouge Co.*, 269 U.S. 411, 70 L. Ed. 339 (1926), heretofore of limited application under the old forms of practice. See *Reeves* v. *Beardall, supra*; *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d (2d Cir. 1943). It is not meaningful to say that the original Rule 54(b) made appealable

decisions on one of several claims which would not have been appealable before the Rule, inasmuch as "partial" decisions of the same character were not, except rarely, rendered in actions prior to the advent of Rules.

While the Rules contained within themselves a means whereby the district courts could make an initial separation of judicial units and decide upon them serially, the review of district court action for its effect on appellate jurisdiction naturally remained in the appellate courts. Under the original Rules, appeals proliferated due to uncertainty and confusion as to whether a district court had intended to make an affirmative "final" order and, even more, as to whether claims and counterclaims arose out of the same or different transactions or occurrences. See Notes of Advisory Committee to the 1948 Amendment to Rule 54(b), *Report of Proposed Amendments to the Federal Rules of Civil Procedure* (1946), pp. 70-72; *Wright* v. *Gibson*, 128 F. 2d 865 (9th Cir. 1942); *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621 (2d Cir. 1943); *Toomey* v. *Toomey*, 149 F. 2d 19 (D.C. Cir. 1945); *Libby-Owens-Ford Glass Co.* v. *Sylvania Indust. Corp.*, 154 F. 2d 814 (2d Cir. 1946), certiorari denied 328 U.S. 859, 90 L. Ed. 1630 (1946); *Clark* v. *Taylor*, 163 F. 2d 940 (2d Cir. 1947); *Munson Line* v. *Green*, 165 F. 2d 321 (2d Cir. 1948); 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.26, pp. 200-203.

C. The amendment to Rule 54(b) was intended to indicate clearly the time at which, in the view of the district court, an appeal should be taken.

The uncertainty about whether a given district court order was final made it necessary for the losing party to seek a prompt appeal from "partial" decisions; otherwise the right might be irrevocably lost because the time for

appeal had passed. *Cf. Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 94 L. Ed. 299 (1950); *Rector* v. *United States*, 20 F. 2d 845, 872 (8th Cir. 1927). Consequently, the compulsion to appeal imposed a burden upon parties and appellate courts beyond all reason. See Notes of Advisory Committee to the 1948 Amendment, *supra; Audi-Vision Inc.* v. *RCA Mfg. Co., supra.* In view of these difficulties, amendment of Rule 54(b) was undertaken in order to restrict appeals by stressing "the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence." Notes of Advisory Committee to the 1948 Amendment, *supra.*

The draftsmen responsible for amendment became discouraged in their initial attempts to resolve the difficulties inherent in the terms "claim", "counterclaim", and "arising out of a single transaction or occurrence." To escape from these problems of definition, they settled upon a simple rule of "discretion," whereby the form of the trial judge's order would reveal his intention See 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.01, pp. 7, 11-12. There can be little doubt that the amendment was "designed to reduce the likelihood of interlocutory appeals in cases not provided for by statute." Moore & Vestal, "Federal Appellate Procedure," 35 Va. L. Rev. 1, p. 6, note 18 (1949). As Justice Jackson observed, in a case arising shortly after the amendment which pointed up the most serious problem under the original Rule, "The obvious purpose of this section, as indicated by the notes of the advisory committee, is to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment of the character we have here. It provides an opportunity for litigants to obtain from the District Court a clear state-

ment of what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly." *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 512, 94 L. Ed. 299, 302 (1950).

In the *Dickinson* case, *supra*, a decree of the trial court dismissed a corporation-intervenor's equitable claim, filed in an action originally involving two individuals who claimed rights in the shares of the corporation. The corporation did not appeal from the original order of dismissal. Thereafter the district court proceeded to determine the rights of other parties, including the shareholders, and issued a second decree designated as final, from which the corporation appealed. The Supreme Court, acting under the original Rule 54(b), held that the *first* decree of dismissal was final as to the corporation, and that time for appeal had expired before the appeal was taken. Dissent in this case turned on a difference in view as to the finality of the respective decrees, Justice Black emphasizing the reservations of the district court judge in entering the earlier decree. See 338 U.S. at pp. 518-519, note 3, 94 L. Ed. at p. 306. Justice Black also doubted that even the amendment to Rule 54(b) had "charted a clear route through the jungle." 338 U.S. at p. 517, 94 L. Ed. at p. 305. Thus, in both majority and minority opinions in the *Dickinson* case, this Court attributed a limited purpose and effect to the new Rule 54(b), and expressed a qualified optimism regarding its role.

Judge Clark of the Court of Appeals for the Second Circuit has, upon at least one occasion, recognized a similar limited purpose in the revision of the Rule. "The value of the amendment to Rule 54(b) and its very real success to date depend upon its more or less automatic fixing of the attention of the trial judge upon this issue, more normally

within the perspective of the reviewing than the trial court, and its providing of a convenient guidepost that he can employ to make his intent clear." Concurring opinion in *Butler* v. *Ungerleider*, 187 F. 2d 238, 239 (2d Cir. 1951). See also *Creel* v. *Creel*, 184 F. 2d 449, 452 (D.C. Cir. 1950).

Nowhere does a review of the background of Rule 54(b) suggest that there was an intention on the part of the Supreme Court to give trial judges the power conclusively to decide the jurisdiction of appellate courts, or, put differently, to make a trial judge's characterization of his own order as "final" per Rule 54(b) an unreviewable determination. Nor is there any indication that the appellate courts, including this Court, were to be stripped of their inherent power to examine all the elements of their own jurisdiction.[3]

To the contrary, it is highly significant that in one of the early drafts of the original Rules—that of May, 1936—the following Rule was proposed:

"Rule 63. Judgments; Costs.

• • •

"(b) *Judgments in Favor of and against Various Parties at Various Stages.* A judgment or a final order may be entered by the court upon any issue

---

[3] We are not unmindful of the fact that leading members of the Advisory Committee, Judge Clark and Professor James Moore, have from time to time asserted more far-reaching objectives for the 1948 amendments to the Rule. However, we have based our conclusions on the drafts and reports of the Advisory Committee, and on this Court's own contemporaneous statement of the purpose of the amendment, made in the **Dickinson** case, rather than on the later recollections of individuals, however prominent in formulating the Rules. An "act of legislation is not the act of one legislator, and its meaning and purpose must be expressed in words." **Banco Mexicano v. Deutsche Bank**, 263 U. S. 591, 602, 68 L. Ed. 465, 469 (1924); see also **United States v. Wrightwood Dairy Co.**, 315 U. S. 110, 125, 86 L. Ed. 726, 736 (1942).

> or issues determined in favor of or against any party or parties at any stage of an action, and the action may proceed as to the remaining issues or parties as justice may require. *A judgment or order entered pursuant to this rule shall be final for all purposes, including the right to appeal therefrom.*" (Italics added.)

Preliminary Draft of Rules of Civil Procedure (May 1936), p. 109.

Here, indeed, was an explicit rule, at least as far as its effect upon an appellate court was concerned. The draft rule promptly provoked serious misgivings as to validity, because of its infringement on the expressed will of Congress with regard to the determination of appellate jurisdiction. See Miscellaneous Correspondence and Documents of the Advisory Committee,[4] particularly, letters to the Committee from Judge V. A. Griffith (July 12, 1936) from George F. Longsdorf, Esq. (August 5, 1936), from the Committee on the Rules for the Southern District of Texas (August 8, 1936), and from the District of Columbia Bar Association (August 18, 1936). As Professor Moore remarks, this rule might well have "materially enlarged" appellate jurisdiction. 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.21, p. 166. See also Judge Frank's concurring opinion in *Pabellon* v. *Grace Line*, 191 F. 2d 169, 177-178 (2d Cir. 1951), certiorari denied 342 U.S. 893, 96 L. Ed. 669 (1951). The proposed rule was therefore deleted, to be replaced by the original Rule 54(a). See *Report of Advisory Committee on Rules for Civil Procedure* (April 1937), p. 135.

In the light of this history it seems more than a little unlikely that the Supreme Court or the Advisory Com-

---

[4] These materials, in mimeographed form, were examined by counsel for the petitioner at the Law Library of the University of Chicago, and are presumably available to both the Court in their original form and opposing counsel.

mittee sought to accomplish by indirection what they hesitated or feared to announce boldly and clearly.

D. The language of Rule 54(b) as amended does not confer on the district courts power to decide appellate jurisdiction.

While the history and context of the new Rule 54(b) points to its limited function as a rule of district court procedure, the meaning of the Rule is primarily "to be searched for in the words * * * employed to convey it." *Schooner Paulina's Cargo* v. *United States*, 7 Cranch 52, 60, 3 L. Ed. 266, 269 (1812). And the background of the Rule "must give way to its language." *Mackenzie* v. *Hare*, 239 U.S. 299, 308, 60 L. Ed. 297, 300 (1915). We must therefore ascertain whether the Rule by its terms clearly precludes appellate review of the jurisdictional elements required for appeals by Congress.

Rule 54(b) as amended provides:

> "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

The Rule appears in Part VII of the Rules, generally entitled "Judgment." It is well-separated from that part of the Rules, Part IX, dealing with "Appeals"; and no

rule of the "Appeals" Part makes cross-reference to Rule 54(b), although the "Appeals" rules do contain numerous cross-references to other rules.

The Rule itself covers, in sub-section (a), the form of judgments; in sub-section (c), the relationship of judgments to demands for relief; and in sub-section (d), matters of costs. In the midst of these pedestrian procedural surroundings, it is contended by respondents that, as Judge Learned Hand describes it, a revolutionary inversion in the determination of appeals has been wrought. See *Flegenheimer* v. *General Mills*, 191 F. 2d 237, 241 (2d Cir. 1951).

The language of Rule 54(b) does not encourage notions of a revolution in appellate jurisdiction. The Rule simply requires that if the district court makes (1) an "express determination that there is no just reason for delay", and (2) "an express direction for the entry of judgment", the court may enter a "final judgment" upon one or more of multiple claims. It then goes on to say that in the absence of such direction and determination, "any order or other form of decision * * * shall not terminate the action as to any of the claims", and the district court may revise its order or decision at any time before entry of judgment.

The words "final judgment" in the first sentence of the Rule refer obviously to no more than a judgment which the trial court judge *intends to make final as far as he can.* This term is not and cannot be the equivalent in meaning and effect to "final decisions" in Section 1291 of Title 28 of the United States Code, or to "final judgment" as used in Section 29 of Title 15, United States Code, and in Section 45 of Title 49, United States Code. The words have no definitive significance for appellate courts looking at their

own jurisdiction. The second sentence of the earlier draft Rule 63(b)—"A judgment or order entered pursuant to this rule shall be final for all purposes, including the right to appeal therefrom"—would have squarely raised the question whether the Rules were putting a new content and definition into the several jurisdictional statutes. But Rule 54(b) as amended makes no reference to effect on *appellate* courts or *appellate* jurisdiction. To accomplish the jurisdictional revolution, the respondents must perforce add back the missing language of Draft Rule 63(b), deleted for obvious reasons, to Rule 54(b) as amended.

In support of a narrower view, the phrase "final judgment" is amplified and explained in the next sentence of the Rule. This gives a wholly negative significance to the phrase in the first sentence. Absent the necessary formal steps—a determination and a direction—the order is not final in any sense; the district court has refused to let the decision in question out of its control. There is nowhere a provision conveying an affirmative meaning to "final judgment" which would bind an appeals court. Judge Learned Hand has summed up the meaning of the new Rule as follows:

> "This is language of restriction, not of grant; it sets limitations upon the district court's power to enter a 'final judgment'; nowhere in it can be found a suggestion that the judge can make that 'final' which was not 'final' before." *Flegenheimer* v. *General Mills*, 191 F. 2d 237, 241 (2d Cir. 1951).

As far as we have been able to ascertain, every court which has considered the matter recognizes the effectiveness of the Rule in its *negative* operation. *See, e.g., Etten* v. *Kauffman*, 179 F. 2d 302 (3rd Cir. 1950), certiorari denied 340 U.S. 931, 95 L. Ed. 672 (1951); *Winsor* v. *Daumit*, 179 F. 2d 475 (7th Cir. 1950); *David* v. *District of Columbia*, 187 F.

2d 204 (D.C. Cir. 1950); *Republic of China* v. *American Express Co.*, 190 F. 2d 334 (2d Cir. 1951; *Burkhart* v. *United States*, 210 F. 2d 602 (9th Cir. 1954); *Brandt* v. *Renfield Importers*, 216 F. 2d 206 (8th Cir. 1954). The reason is apparent. Where the trial court refuses to enter the direction or determination required by Rule 54(b), one essential element of finality is lacking. The district court's silence or refusal to enter a direction and determination are equivalent to a reservation of power to change the decision at a later date, and this kind of reservation has always been effective to establish the interlocutory rather than final character of a decision. See *Republic of China* v. *American Express Co.*, 190 F. 2d 334, 338-339 (2d Cir. 1951); *cf. Covington* v. *First National Bank*, 185 U.S. 270, 277, 46 L. Ed. 906, 908 (1902); *Paducah* v. *Tennessee Telegraph Co.*, 229 U.S. 476, 480, 57 L. Ed. 1286, 1288 (1913); *United States* v. *Fallbrook Public Utilities Dist.*, 109 F. Supp. 28, 43 (D.C. S.D. Calif. 1952).

In terms of the basic analysis of the elements of finality presented hereinabove,[5] the new Rule seeks simply to make certain the time as of which the district court "lets go" of its partial decision. Until the court releases its decision without reservation, or "finally", by appropriate determination and direction, a party may safely refrain from filing an appeal. *Cf. Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 94 L. Ed. 299 (1950); *Rector* v. *United States*, 20 F. 2d 845, 872 (8th Cir. 1927). The new Rule extends that "measure of certainty concerning appealability as is afforded by assurance that without these findings a partial disposition of a law suit is on its face incomplete and will not be appealable." Hastie, J., in his concurring opinion in *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 280 (3rd Cir. 1952).

---

[5] See p. 12 of this brief.

If the court does release its decision, the adversely affected party is put on notice that the district court has finished in the matter, and that party is further advised that it is time to appeal or risk the loss of the right to appeal. The district court has gone as far as it can in our judicial system. The notice and advice is not affirmatively conclusive, for the appellate court must still consider whether the lower court action amounts to a judgment on a separate and distinct judicial unit, whatever may be the district court's position.

Although the appellant receives no assurance that the appellate court will agree with the district court's view that an independent claim has been settled, this is not an undue or novel hardship. First, the appellant, if in serious doubt as to statutory finality, may seek to persuade the district court to refrain from a Rule 54(b) direction and determination Second, the district court's entry of judgment under Rule 54(b) seems more likely to be accepted than repudiated as a judgment on a separate judicial unit. Third, it is not unusual, despite the inconvenience to litigants, that the action of an appeals court cannot be determined beforehand in the lower court. For example, although appeals to this Court, as distinguished from petitions for certiorari, are as of right and each appellant sets forth a basis for the statutory jurisdiction of the Court, the Court dismisses a very large number of appeals on review of the jurisdictional statement. See Stern & Gressman, *Supreme Court Practice* (2d ed. 1954), pp. 225, 233-237. Moreover, it is not uncommon for an appellant to find that an appellate court on review may dismiss an action because, notwithstanding the district court's view, it finds that fundamental federal jurisdiction was lacking *ab initio*.

We do not mean at all to suggest that the mechanism of appeals is flawless or even satisfying; but simply that

amended Rule 54(b), as interpreted by the petitioner, is geared to fit into and improve in a *limited* way the old statutory vehicle of finality. As interpreted by the respondents, new Rule 54(b) would improve the vehicle by replacing the old drivers with their juniors, who are apt to be more erratic.

E. The amended Rule affects also the jurisdiction of the Supreme Court, which has consistently rejected the view that a lower court may control the jurisdiction of an upper court.

While the case of *Mackey* v. *Sears, Roebuck and Co.*, now before the Court, directly relates to the effect of Rule 54(b) upon the courts of appeals, the direction given here by the Supreme Court will also affect its own jurisdiction and power to determine that jurisdiction. Under the Expediting Act of 1903, civil cases under the antitrust laws and the Interstate Commerce Act, where the United States brings the action, are subject to appeal "from the final judgment of the district court" to this Court. 32 Stat. 823, 15 U.S.C. Secs. 28-29 and 49 U.S.C. Secs. 44-45 (as amended). See *United States* v. *California Co-op. Canneries*, 279 U.S. 553, 73 L. Ed. 838 (1929); *Allen Calculators, Inc.* v. *Nat. Cash Reg. Co.*, 322 U.S. 137, 88 L. Ed. 1188 (1944); *National Association of Real Estate Boards* v. *United States*, 176 F. 2d 631 (D.C. Cir. 1949), reversed on other grounds, 339 U.S. 485, 94 L. Ed. 1007 (1950). An appeal may also be taken directly to the Supreme Court from the "final judgment" of the district court in actions by the federal government to enforce parts of the Federal Communications Act. 47 U.S.C. Sec. 401(d). The district courts referred to in these statutes are, of course, district courts governed by the same Federal Rules of Civil Procedure of which Rule 54(b) is a part. *Accordingly, the interpretation of the Rule urged by the respondent would result in this Court, as well as the courts of appeals, becoming irre-*

vocably bound by the direction and determination of the district court. See 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.28, p. 216.

But in numerous decisions this Court has consistently and thoroughly rejected the theory that the court from which an appeal is taken may determine the finality of the judgment on appeal. The contention has arisen upon several occasions involving appeals to the Supreme Court from the highest court of a state in which judgment could be had, under a jurisdictional statute which also requires that appeal be based on "final judgments or decrees." 28 U.S.C. Sec. 1257. While this Court will ordinarily consider the effect and incidents of a judgment under local procedure, "the designation given the judgment by state practice is not controlling." *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 72, 91 L. Ed. 80, 87 (1946). The "test is not whether under local rules of practice the judgment is denominated final • • • but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking* v. *Pink*, 317 U.S. 264, 268, 87 L. Ed. 254, 257 (1942). See also *Holcombe* v. *McKusick*, 20 How. 552, 554-555, 15 L. Ed. 1020, 1021 (1858); *Georgia Railway and Power Co.* v. *Decatur*, 262 U.S. 432, 436-437, 67 L. Ed. 1065, 1072-1073 (1923); *Market Street R. Co.* v. *Railroad Com. of Calif.*, 324 U.S. 548, 551-552, 89 L. Ed. 1171, 1176 (1945); *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 91 L. Ed. 1662 (1947). This Court's independence of the lower court's characterization of its own acts as final is strikingly illustrated by comparing the *Richfield Oil* case, *supra*, with the *Gospel Army* case, *supra*. In these cases the California courts rendered judgments in substantially the same form, having the same standing with respect to "finality" in

state practice. But, upon an examination of their actual impact under the circumstances of each case, the judgments were given differing effects for purposes of appeal.

That this Court has reserved, without diminution, the power to review questions relating to its appeals jurisdiction comes as no surprise. Such a power to review, and exercise of the power, is a necessary part of the sifting and filtering process whereby the Court follows Constitutional and Congressional directives, limits its review to important cases at a matured stage of litigation, and maintains a manageable docket. See Stern & Gressman, *Supreme Court Practice* (2d ed. 1954), pp. 10-11.

The same considerations are pertinent to the courts of appeals' authority to review decisions. Nothing in the Rules, including Rule 54(b), indicates a design to change the relationship of appellate courts to courts below, or limit what the appellate court may or may not review. As Judge Learned Hand has succinctly observed, referring to an interpretation of Rule 54(b) identical to the respondents', "Although there are of course abundant instances where appellate courts are granted a discretion as what they will review, so far as we know, this would be unique, if it conferred a power upon a lower court to determine the jurisdiction of a higher court." *Flegenheimer* v. *General Mills*, 191 F. 2d 237, 241 (2d Cir. 1951). Judge Hastie has criticized the expansive view of the respondent as a "novel conception of judicial power which enables a court of first instance in its discretion from case to case to determine whether its orders are sufficiently inclusive to be of appealable character. The conception is the more remarkable in this case because it involves authority to change the meaning of a statute at will and in the process to ignore the Supreme Court's prior construction of that statute. * * * Moreover, this sport in

judicial power would derive from a mere rule of district court procedure." Concurring opinion in *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 281 (3rd Cir. 1952).

To summarize, the language of amended Rule 54(b) is designed at most to have the district court mark the completion of its own action on one of several claims, and this is not the complete test of "finality" under the Congressional statutes for appellate jurisdiction. The 1948 amendment to the Rule did accomplish the stated purpose of its draftsmen—to eliminate the need for appeal, arising out of litigants' proper caution and uncertainty, from every decision in multiple claims cases.

In the succeeding section of this brief, the petitioner will consider the legality of the expansive interpretation recommended by the respondents. Since in no sense whatever is the respondents' interpretation compelled by the language of the Rule, a demonstration of the invalidity of that interpretation has evident relevance to the matter of correct interpretation. *Wash'n.-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 68 L. Ed. 480 (1924). As "between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 30, 81 L. Ed. 893, 908 (1937).

II. If, under Rule 54(b), a District Court Judge's Order were "Final" and beyond Review, the Rule would Exceed the Rule-Making Power of the Supreme Court and would be Invalid as a Violation of Congressional Statutes and the Constitution of the United States.

Article III, Section 1, of the Constitution of the United States gives Congress the power to "ordain and establish" courts inferior to the Supreme Court. Under Article

I, Section 8, of the Constitution, Congress has the power "to constitute" tribunals inferior to the Supreme Court. This grant has long been construed to mean that only Congress can confer jurisdiction upon the inferior federal courts and only Congress can regulate the scope and terms of that jurisdiction. "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon* v. *Sill,* 8 How. 441, 449, 12 L. Ed. 1147, 1151 (1850). See also *Turner* v. *Bank of North America,* 4 Dall. 8, 1 L. Ed. 718 (1799); *United States* v. *Hudson and Goodwin,* 7 Cranch 32, 3 L. Ed. 259 (1812); *Cary* v. *Curtis,* 3 How. 236, 11 L. Ed. 576 (1845); *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 67 L. Ed. 226 (1922).

On the other hand, there is little question that the Supreme Court and the lower federal courts have the inherent power to adopt rules of practice and procedure for the conduct of their affairs. But that power is severely limited. "It will not be contended that Congress can delegate to the courts, or to any other tribunals powers which are strictly and exclusively legislative". The "courts * * * may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description", but the "power given * * * is a power to vary minor regulations." *Wayman* v. *Southard,* 10 Wheat. 1, 42, 43, 45, 6 L. Ed. 253, 262, 263 (1825); see also *Bank of the United States* v. *Halstead,* 10 Wheat. 51, 6 L. Ed. 264 (1825). As Justice Brandeis has defined the permissible scope of court rules, it is "to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation, and effect of process; and the prescribing of forms, modes, and times for proceedings * * * But no

rule of court can enlarge or restrict jurisdiction." *Wash'n.-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635, 68 L. Ed. 480, 483 (1924). See *Hudson* v. *Parker*, 156 U. S. 277, 284, 39 L. Ed. 424, 426, (1895); *Davidson Bros. Marble Company* v. *United States*, 213 U. S. 10, 18-19, 53 L. Ed. 675, 678 (1909); *Sibbach* v. *Wilson*, 312 U. S. 1, 85 L. Ed. 479 (1941); *United States* v. *Sherwood*, 312 U. S. 584, 589-590, 85 L. Ed. 1058, 1063 (1941).

In section 1291 of Title 28, United States Code, Congress has set forth a standard of "final decisions" for appeals. Pursuant to that statute and its predecessors and analogues, the appellate courts have always had the duty and the power to determine their own jurisdiction. See *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. Ed. 462 (1884); *Collins* v. *Miller*, 252 U. S. 364, 64 L. Ed. 616 (1920); *Republic Iron & Steel Co.* v. *Youngstown S. & T. Co.*, 272 Fed. 386 (6th Cir. 1921); *United States* v. *Curran*, 18 F. 2d 953 (2d Cir. 1927); *Raytheon Mfg. Co.* v. *Radio Corporation of America*, 76 F. 2d 943 (1st Cir. 1935), aff'd 296 U. S. 459, 80 L. Ed. 327 (1935); *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621 (2d Cir. 1943); *United States* v. *Tinkoff*, 153 F. 2d 106 (7th Cir. 1946), certiorari denied 329 U.S. 740, 91 L. Ed. 638 (1946); *Tomlinson* v. *Poller*, 220 F. 2d 308 (5th Cir. 1955). Regardless of the acquiescence, tacit or otherwise, of the parties, or the views of the lower court, the question of appellate jurisdiction is always "a matter for the appellate court to decide." Clark, J., in *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621, 623 (2d Cir. 1943).

If the restricted rule-making power of the Supreme Court and an Act of Congress are in conflict upon a matter delegated to Congress, clearly the rules must give way. Under the broad interpretation of Rule 54(b) pro-

posed by the respondents, there would be more than a conflict; Section 1291 of Title 28, United States Code, and its concomitant of appellate examination of appellate jurisdiction, would be wholly undermined. For the term of the statute "final decisions", Rule 54(b) would substitute the phrases, an "express determination that there is no just reason for delay" and an "express direction for the entry of judgment."[6] Moreover a further amendment to the statute would seem to be required to make it clear that the courts of appeals will not be entitled to review the district courts' actions, except to ascertain that the "direction" and "determination" really exist.

Under the respondents' theory, Rule 54(b) would indeed become a highly potent procedural weapon, capable of solving all appeals problems by ordering them out of existence at the behest of the trial judge. In the colorful language of Judge Frank, Rule 54(b) so construed "strikingly affects appellate jurisdiction by authorizing trial judges to play on it like an accordion." *Pabellon* v. *Grace Line*, 191 F. 2d 169, 177 (2d Cir. 1951). It is worth noting, however, that a somewhat similar interpretation of a "procedural" rule, dealing ostensibly with security for damages, fared badly at the hands of this Court. The rule in that instance had, as interpreted below, the practical effect of denying access to the courts contrary to statute. *Wash'n-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 68 L. Ed. 480 (1924).

Rule 54(b), expansively interpreted, violates not only the jurisdictional statute itself but the Enabling Act (Act of

---

[6] The sections governing direct appeals to the Supreme Court would undergo similar revision. See 15 U. S. C., Sec. 29, 49 U. S. C., Sec. 45, 47 U. S. C., Sec. 401(d).

June 19, 1934, c. 651, 48 Stat. 1064, 28 U. S. C., Sec. 2072) authorizing the Rules as well. The latter Act gives the Supreme Court power to promulgate general rules for the district courts very much in the terms used by Justice Marshall in defining the rule-making power, *i.e.*, regulating the forms of process, writs, pleadings, and motions, and practice and procedure. The Enabling Act does not authorize any enlargement or abridgment or "incidental" tampering with appellate jurisdiction. And this Court has consistently noted the limitations on the rule-making power, first in the Rules themselves and then in cases which have arisen since their promulgation. Thus, Rule 82 provides, "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts." To grant to district courts the power conclusively to determine appeals jurisdiction of the higher federal courts appears in itself to be a notable extension of the jurisdiction of the district courts. But were this not so, Rule 82 carries with it the clear implication that the Rules may not be interpreted to extend or restrict the jurisdiction of *appellate* courts. See *Flegenheimer* v. *General Mills*, 191 F. 2d 237, 241 (2d Cir. 1951). In *Sibbach* v. *Wilson*, this Court recognized its inability "to extend or restrict the jurisdiction conferred by a statute" by means of the Federal Rules. 312 U.S. 1, 10, 85 L. Ed. 479, 483 (1941); see also *United States* v. *Sherwood*, 312 U.S. 584, 589-590, 85 L. Ed. 1058, 1063 (1941). The Rules "do not affect the jurisdiction of the appellate courts to which they are not directed." *Hunteman* v. *New Orleans Public Service*, 119 F. 2d 465, 466 (5th Cir. 1941), certiorari denied 314 U. S. 647, 86 L. Ed. 519 (1941).

In view of the contradiction between the respondents' proposed interpretation with other, controlling laws and

statutes, the question naturally arises: how has that interpretation been accepted by able judges, including notable advisors on the drafting of the Federal Rules, and how has it been defended? Notwithstanding the talent employed, the arguments for the validity of the Rule are, from point to point, mutually inconsistent. They range from assertions that this rule of "procedure" only "incidentally" affects jurisdiction, to assertions that concern for jurisdictional considerations reflects a fetishistic tendency; to contentions that the interpretation is desirable to avoid appeals problems and therefore must be proper; to arguments that curbing Rule 54(b) threatens the Rules' joinder of law and equity and the whole structure of the Rules, as well as vitiating or destroying a large number of the individual rules.

The Court of Appeals below simply held that the "new rules have the effect of statutes" and "*any* laws in conflict therewith would no longer be of any force or effect" (Italics added). *Mackey* v. *Sears, Roebuck and Co.*, 218 F. 2d 295, 299, R. 40, 45 (7th Cir. 1955). This seems to disregard the constitutional and statutory limitations on the Rule's scope, as well as the pronouncements of the Supreme Court on the subject. The Court below also found that "in one sense" the jurisdiction of a court of appeals is affected by a Rule 54(b) order, but the effect is accomplished "indirectly". 218 F. 2d at 299, R. 40, 45. *Cf. Wash'n-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 68 L. Ed. 480 (1924). Furthermore, the Court held that Rule 54(b) as interpreted by it is, like Rule 73 (a), a rule which merely shortens the time for taking an appeal. 218 F. 2d at 299, R. 46. We may well pass over this contention except to note briefly that (1) the *quantum* of time is an arbitrary matter at best, reflecting no policy whatever

as to *whether* an appeal may be taken,[7] and, more important, (2) a prescribed period of time has never been the fundamental criterion of jurisdiction, as has been the "final decisions" rule. Also, as the Notes of the Advisory Committee to Rule 73(a) make clear, Rule 73(a) has been intended as a supplement to section 1291, Title 28, United States Code, not as a replacement for it. *Cf. Hart* v. *Knox County, Tenn.*, 171 F. 2d 45 (6th Cir. 1948).

The Court of Appeals for the Third Circuit in the majority opinion in *Bendix Aviation Corp.* v. *Glass,* 195 F. 2d 267 (3rd Cir. 1952), recognized the mechanical, conclusive effect of the interpretation adopted, but found a virtue in this: "Surely a district judge is in an excellent position to determine from the standpoint of justice to the litigants the best time at which to terminate by final judgment the litigation * * * and thus open the way to immediate appellate review and execution of the judgment". 195 F. 2d 267, at pp. 271-272. The Court also explained that the phrase "final decisions" in the jurisdictional statute was not defined, and must inevitably be given content by reference to the proceedings of district courts. 195 F. 2d 267, at pp. 270-271. But the Court failed to explain why the procedural rules *necessarily* yield final judgments in the sense of the jurisdictional statute, and especially why the appellate court is to be enjoined from looking into finality in either the procedural sense, if any question should arise, or the statutory sense.

In a series of opinions, Judge Clark, representing one segment of opinion of the Court of Appeals for the

---

[7] Query whether a Rule of Procedure could set two days (with elaborate filing of documents necessary), or ten years, as the time for appeal, thus either practically denying the right of appeal or suspending the operation of the laws.

Second Circuit, has expressed himself most vigorously in favor of the broad interpretation of the Rule. See *Lopinsky* v. *Hertz Drive-Ur-Self Systems*, 194 F. 2d 422, 424-430 (2d Cir. 1951); *Pabellon* v. *Grace Lines*, 191 F. 2d 169 (2d Cir. 1951); and *Rieser* v. *Baltimore & Ohio R. Co.*, — F. 2d —, 21 Fed. Rules Serv., Sec. 54b. 4, Case 5 (2d Cir. June 9, 1955). As a principal author and proponent of the Federal Rules, Judge Clark's views are entitled to respectful hearing; however we believe that they are far from convincing on this issue. Judge Clark has been concerned especially that a conclusion adverse to *his* interpretation* of Rule 54(b) might jeopardize "fully a third of the federal civil rules". See *Lopinsky* v. *Hertz Drive-Ur-Self Systems, supra*, at p. 425. The danger he foresees lies in the fact that numerous other Rules affecting appellate practice, of far-reaching effect, may be challenged. *Lopinsky* v. *Hertz Driv-Ur-Self Systems, supra*, at pp. 426-427. Without reviewing the many Rules cited in Judge Clark's opinions, his sense of menace arising out of the Rule 54(b) dispute is surely exaggerated by a consistent failure to distinguish between appellate *jurisdiction* and *practice*. As to the latter, Congress has no special Constitutional power, and in any event may be considered to have delegated considerable power to alter practice and procedure through the Enabling Act. The argument based on amalgamating all the Rules into a single unit is similar to an argument that a particular federal statute is not unconstitutional because other, related statutes are not unconstitutional. In further support of his position, Judge Clark considers

*Judge Learned Hand's interpretation of Rule 54(b), which presents no question of invalidity, is dismissed as an interpretation in extremis, to preserve the "remnants" of Judge Clark's rule. See *Lopinsky* v. *Hertz Drive-Ur-Self Systems, supra*, at p. 425, note 1.

Rule 54(b) a "good" and "beneficial" rule which allows a judge with an "overall picture" to channelize appeals. *Lopinsky* v. *Hertz Drive-Ur-Self Systems, supra,* pp. 429-430. He recommends that possible abuses of Rule 54(b) by lower courts be handled by "administrative control through court councils or directors," which would seem to offer a kind of review both novel and informal. *Lopinsky* v. *Hertz Drive-Ur-Self Systems, supra,* at p. 429.

Professor Moore, who must also be counted a proponent of the 'affirmative" interpretation of the Rule, although he anticipates many difficulties with it,* offers as a justification for his position the Supreme Court's ultimate power as arbiter of federal issues. This argument proceeds: if the Supreme Court has the power to determine what is a "final decision" in a given case, then it may do the same by a general pronouncement in exercise of its rule-making powers. 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.29, pp. 226-227. Whether or not this Court can use the Rules as a vehicle for formulating general definitions to be fitted into Congressional statutes is itself an interesting question, but beyond the scope of this case. This is not, however, the effect of the affirmative interpretation of Rule 54(b). Rather, on this construction of the Rule, the Supreme Court has abdicated both for itself and for the courts of appeals the power to review jurisdictional questions, and has allowed that power to be subordinated to the discretion of trial court judges. The interpretation, again, writes off Section 1291. Elsewhere, still in conjunction with Rule 54(b), Professor Moore deprecates the "tendency to make a fetish

*See 6 Moore, Federal Practice (2d Ed. 1953), par. 54.62, pp. 226-232.

out of jurisdiction." 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.43, p. 275. This point of view naturally assists an affirmative interpretation of Rule 54(b), but the courts can hardly abandon the concern for jurisdictional limitations set by Congress under the Constitution.

III. The Interpretation of Rule 54(b) as a Rule Fixing Appellate Jurisdiction does Violence to Orderly Appellate Procedure and Creates as Many Problems of Judicial Administration as It Resolves.[20]

The respondent's view has had considerable attraction to some judges of the courts of appeals. It appears to be mechanical and certain as far as these courts are concerned. If the trial judge uses the magical words, there is appellate jurisdiction; if he does not, there is no appellate jurisdiction. It thus relieves courts of appeals from the task of deciding the often difficult question of whether or not an order is final, and delegates the decision entirely to the district courts.

Unfortunately, delegation of authority to deal with problems does not usually eliminate the problems. Even in its negative aspects, some difficulties will be encountered under the Rule, although they appear to be manageable. For example, how shall the exceptional "offshoot" situations, involving collateral issues, be treated under the Rule, where a preliminary order may cause a substantial change of position or a decisive loss or harm to one party and yet the district court in a multiple claims case refuses to label his order "final?" See *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404 (1848); *Radio Station W.O.W., Inc. v. Johnson*, 326 U.S. 120, 89 L. Ed. 2092

---

[20] We shall not again review the anomalous aspects of a rule which gives courts of first impression the power to decide matters governing the jurisdiction of courts of appeals and the Supreme Court, although it might be especially appropriate at this point.

(1945); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 93 L. Ed. 1528 (1949); *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 94 L. Ed. 1206 (1950). Professor Moore suggests that in these situations the order would be final despite the district court's failure to label it so. 6 Moore, *Federal Practice* (2d ed. 1953), pars. 54.31, 54.32, pp. 235-238. But *cf.* Judge Clark's opinion in *Republic of Italy* v. *DeAngelis*, 206 F. 2d 121, 132 (2d Cir. 1953).

Further, suppose a district court judge denies the right of a party to intervene under circumstances where the right to intervene is absolute, and the court fails or refuses to enter an appropriate Rule 54(b) order. Notwithstanding the absence of the magical direction or determination, Professor Moore would allow appeal from this kind of order, or would recommend use of mandamus to bring the matter to the court of appeals from the district court. See 3 Moore, *Federal Practice* (1st ed. 1952 Cum. Supp.), par. 54.02, pp. 13-14.

In other areas there remain problems of interpretation. The Court of Appeals for the Seventh Circuit holds that Rule 54(b) applies also to interlocutory orders, appealable under Section 1292 of Title 28, United States Code. Other courts disagree. See *Packard Motor Car Co.* v. *Gem Mfg. Co.*, 187 F. 2d 65 (7th Cir. 1951), certiorari dismissed 342 U.S. 802, 96 L. Ed. 607 (1951). *Contra*: *Cutting Room Appliances Corp.* v. *Empire Cutting Machine Co.*, 186 F. 2d 997 (2d Cir. 1951); *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122, 128-129 (3rd Cir. 1954).

Does the amended Rule, broadly interpreted, apply to the dismissal of a claim against one of several parties? Compare *Vale* v. *Bondett*, 191 F. 2d 334 (D.C. Cir. 1951); *Boston Medical Supply Co.* v. *Lea & Febiger*, 195 F. 2d

853 (1st Cir. 1952), with *Steiner* v. *20th Century-Fox Film Corporation*, 220 F. 2d 105 (9th Cir. 1955); *Hardy* v. *Bankers Life & Cas. Co.*, 222 F. 2d 827 (7th Cir. 1955).

These issues, debatable as they may be, touch only upon the periphery of the Rule's real problems. A more critical question is whether a court of appeals may review an affirmative Rule 54(b) order to determine that the case truly involves "multiple claims", one of which is disposed of by court order? If such review is possible, what constitutes a "claim" for the measure of multiples thereof?

The courts of appeals have asserted the right to review the district court's action in order to determine whether multiple claims truly exist. See *Town of Clarksville, Va.* v. *United States*, 198 F. 2d 238, 240-241 (4th Cir. 1952), certiorari denied 344 U. S. 957, 97 L. Ed. 74 (1953); *Leonidakis* v. *International Telecoin Co.*, 208 F. 2d 934 (2d Cir. 1953); *United States Plywood Corp.* v. *Hudson Lumber Co.*, 210 F. 2d 462 (2d Cir. 1954); *Rao* v. *Port of New York Authority*, 222 F. 2d 362 (2d Cir. 1955); *cf. Gold Seal* v. *Weeks*, 209 F. 2d 802 (D. C. Cir. 1954).

The exercise of this power to review is justified on the ground that the presence of "multiple claims" is a precondition to use of Rule 54(b) (and, at least at this point, the Rule cannot be applied to confer jurisdiction on an appellate court in defiance of law). Thus, in a case where the Court of Appeals for the Second Circuit raised the jurisdictional question *sua sponte*, the Court felt "constrained" to find merely a single claim "not justifying appeal even under the amended form of the rule". *United States Plywood Corp.* v. *Hudson Lumber Co.*, *supra*, at p. 463. Here the Court found a purported counterclaim

upon analysis to be no more than an equitable defense. Notwithstanding the entry of a "final judgment" by the trial judge under Rule 54(b), the Court rejected the appeal.

It is not entirely clear, despite the reason given for review, why this aspect of a trial judge's order should be vulnerable and reviewable from the standpoint of the logic of the expansive interpretation of the Rule. The lack of an express provision barring appellate review of the trial court's "final judgment" apparently does not disturb the proponents of this interpretation. It is but a short step from that position to one whereby the trial judge's finding, either express or by implication (since he entered the magical order), of multiplicity of claims must also be conclusive. Moreover, this short step would seem to be necessary if the broad interpretation of the Rule is to have any purpose or vitality; otherwise a great number of cases on appeal may call for decisions on the issue of "multiplicity".

On close examination the problem of multiple or single claims, in some courts at least, reveals a strong resemblance to the old issue of whether—to meet one test of finality—claims arise out of same or differing transactions or occurrences. See *Reeves* v. *Beardall*, 316 U.S. 283, 86 L. Ed. 1478 (1942). Does the expansive interpretation of Rule 54(b), coupled with the power to review for multiplicity of claims, come round in a semantic circle to the same old issue at the appellate court level? If so, what purpose is accomplished by transferring disputes to a new arena?

Under the amended Rule the Court of Appeals for the Second Circuit, in deciding whether more than one claim is present in an action, would examine the relationship

of one asserted "claim" to another asserted "claim" by reference to the transaction or transactions out of which they arise. In a recent case, to illustrate, the Court found, "The facts show all the questions involved turn upon the single issue as to whether defendant delayed its shipment beyond the time permissible • • • There is thus but a single claim, based upon a single occurrence. *Reeves* v. *Beardall*, 316 U. S. 283, • • •" The Court then held that Rule 54(b) was not applicable, and ignored a district court order made under it. *Leonidakis* v. *International Telecoin Corp.*, 208 F. 2d 934, 935-936 (2d Cir. 1953).

Other courts give a different meaning to "claim" for the purpose of determining multiplicity. Thus, in the *Bendix* case, a compulsory counterclaim arose out of the same transaction involved in the principal claim. The Court of Appeals for the Third Circuit held that "the action in the district court involves multiple claims for relief" because on the one hand equitable relief and on the other, legal damages were sought. *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 269 (3rd Cir. 1952); *cf. Gold Seal* v. *Weeks*, 209 F. 2d 802 (D. C. Cir. 1954); *Interborough News Co.* v. *Curtis Publishing Co.*, 127 F. Supp. 286, 359-360 (D.C.S.D.N.Y. 1954); *Town of Clarksville, Va.* v. *United States*, 198 F. 2d 238 (4th Cir. 1952). Does "claim" mean something other than cause of action? Does it relate simply to the relief requested? Are multiple claims involved if several parties assert rights arising out of the same, or substantially the same set, of facts? The answers are not clear.

Another major problem presented by the affirmative interpretation is that of abuse of discretion by trial court judges. One advantage to the rule against piecemeal ap-

peals, from the standpoint of judicial administration, is the conservation of judicial energy at the upper court level. Another is the assurance that matters will come up on a complete and adequate record. These policies have had enough force to prevail against the convenience of either the litigants or the trial judge. Under the affirmative interpretation of the Rule, it is foreseeable that trial judges may find an appropriate order useful to facilitate *their* work and *their* dockets. Why conduct possibly two trials, or retrials, when the judicious use of Rule 54(b) at an early stage may avoid the need? On a doubtful point of law, many a trial judge will welcome the review of the higher courts. This is not to suggest that the district court judges will wilfully abuse their new-found rights. But the proponents of the broad interpretation place particular stress on the wide discretion afforded trial judges.

In many situations orders will be inherently interlocutory, although they may be certified as "final" in multiple claims cases. For example, the district court may certify a "final" order granting or denying a new trial. *Cf. Libby, McNeill & Libby* v. *Alaska Industrial Board*, 215 F. 2d 781 (9th Cir. 1954); *Kanatser* v. *Chrysler Corp.*, 195 F. 2d 104 (10th Cir. 1952), certiorari denied 344 U.S. 921, 97 L. Ed. 710 (1953). Or, to prevent what may be an unnecessary trial, the district court may allow appeal, by entering a final order, from the denial of summary judgment on one of several claims. Or the trial judge may "finalize" an order requiring the posting of security as a condition to filing an answer. See *Ace Grain Co.* v. *American Eagle Fire Insurance Co.*, 11 Fed. Rules Dec. 164, 364 (D.C.S.D.N.Y. 1951), criticized in *Pabellon* v. *Grace Line*, 191 F. 2d 169, 174, note 4 (2d Cir., 1951).

Those who would give an unreviewable power to district courts over appellate jurisdiction renounce beforehand any effective method of correcting errors. The Court of Appeals for the Third Circuit has encountered this difficulty in the recent case of *District 65* v. *McKague*, 216 F. 2d 153 (3rd Cir. 1954). The case involved an action against a clerk of court and an attorney for respectively illegally paying over and illegally retaining monies. The trial court dismissed the action as to the clerk, without making a Rule 54(b) order, and the Court of Appeals initially refused to review the dismissal because the order lacked the requisite "direction" and "determination" of Rule 54(b). The Court of Appeals observed also that "• • • it is difficult to see how on the alleged operative facts, the ends of justice would be served by the trial court treating the order appealed from as a final "decision". The appellant thereupon went back to the district court, obtained a Rule 54(b) order in good form, and returned again to the Court of Appeals on a petition for rehearing. The Court was able to reject the appeal on the highly technical ground that the district court had no jurisdiction to enter the Rule 54(b) order while the appeal was still pending.[11]

The Court also went on to state:

> "But even if jurisdiction had existed in the court below to enter the order we would deem it to have been improvidently entered. In the next to last sentence of our opinion filed August 17 we stated 'Indeed it is difficult to see how on the alleged operative facts the ends of justice would be served by the trial

[11] The appeal apparently pended although the Court of Appeals found that it clearly lacked jurisdiction under Rule 54(b)! Cf. Etten v. Kauffman, 179 F. 2d 302 (3rd Cir. 1950); Lyman v. Remington Rand, 188 F. 2d 306 (2d Cir. 1951); Roberts v. American Newspaper Guild, 188 F. 2d 650 (D.C. Cir. 1951); Vale v. Bonnett, 191 F. 2d 334 (D.C. Cir. 1951).

court treating the order appealed from as a final decision.' This was the equivalent of stating that the court below could not discreetly make 'an express determination' that there was no just reason for delay. We state for the guidance of the court below that if suits such as that at bar which present no major issue or guiding principle are to be cut up and brought piecemeal before appellate tribunals Rule 54(b) will not fulfill its function and continued disregard of the spirit of the Rule must inevitably lead to its modification or repeal."

216 F. 2d 153, at pp. 155-156,

One may, without much effort, discern in this statement by the Court a note of regret and frustration at having so completely abdicated its power to determine its own jurisdiction.[12]

Up to this point, the discussion has considered some difficulties in the operation of Rule 54(b) interpreted as the respondents would have it. The problems referred to by no means exhaust the possibilities. See 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.43, pp. 286-288. It may be worthwhile at the same time to look at some of the shortcomings of the system of appeals which Rule 54(b), however broadly construed, cannot remedy or palliate.

In numerous situations a need for trial or retrial will disappear and the action will terminate if the trial court's interlocutory orders prove to be erroneous. In other situations the parties may be put in serious jeopardy or suffer irreparable harm and loss as the result of an erroneous, but non-reviewable, order of the trial

[12] See Newburgh Moire Company v. Superior Moire Company, 218 F. 2d 580, 583 (3rd Cir. 1955) where the same Court also took the precaution of stating the conditions for a possible future Rule 54(b) order.

judge. These unfortunate consequences are possible due to the lack of appeal in the following situations:

(1) Denial of a motion to dismiss, where the motion is based upon a legal defense such as a statute of limitations or lack of jurisdiction. See *E. I. Dupont de Nemours Company, Inc.* v. *Hall*, 220 F. 2d 514 (4th Cir. 1955); *Austrian* v. *Williams*, 198 F. 2d 697 (2d Cir. 1952), affirmed, 331 U. S. 642, 91 L. Ed. 1718 (1947); *Hydraulic Press Mfg. Co.* v. *Moore*, 185 F. 2d 800 (8th Cir. 1950).

(2) Denial of a motion for summary judgment. See *Drittel* v. *Friedman*, 154 F. 2d 653 (2d Cir. 1946); *Dutton* v. *Cities Service Defense Corp.*, 197 F. 2d 458 (8th Cir. 1952); *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122 (3rd Cir. 1954).

(3) Grant of a motion for a new trial. See *Kanatser* v. *Chrysler Corp.*, 195 F. 2d 104 (10th Cir. 1952), certiorari denied, 344 U. S. 921, 97 L. Ed. 710 (1953); *Long* v. *Davis*, 169 F. 2d 982 (9th Cir. 1948); *United States* v. *Hayes*, 172 F. 2d 677 (5th Cir. 1949); *Ford Motor Co.* v. *Busam Motor Sales*, 185 F. 2d 531 (6th Cir. 1950).

(4) Denial of a motion to quash a subpoena *duces tecum* or to limit discovery. See *Cobbledick* v. *United States*, 309 U. S. 323, 84 L. Ed. 783 (1940), affirming *Palmuth* v. *United States*, 107 F. 2d 975 (9th Cir. 1939); *O'Malley* v. *Chrysler Corporation*, 160 F. 2d 35 (7th Cir. 1947); *Dille* v. *Carter Oil Co.*, 174 F. 2d 318 (10th Cir. 1949), certiorari denied, 338 U. S. 850, 94 L. Ed. 520 (1949).

The statutory rule of finality thus may work unjustifiable hardship, even if for the generality of cases the rule is desirable and necessary. Rule 54(b) cannot cope with these troublesome situations. As Judge Frank has pointed out, "At most, the Rule can be no more than a tiny

island in a large sea of troubles for litigants." Concurring opinion in *Rieser* v. *Baltimore & Ohio R. Co.*, — F. 2d —, 21 Fed. Rules Serv. 54b.4, Case 5 (2d Cir. June 9, 1955).

IV. The Solution to Difficult Problems of Appellate Jurisdiction Requires Statutory Action Rather Than Tinkering with the Federal Rules.

The overall difficulties with appellate jurisdiction are two-fold, and both stem from the statutory requirement of final decisions as a basis for jurisdiction. First, the term "final decisions" has no inherent precision and requires case-by-case delimitation. Second, where admittedly no final decision has been rendered, appellate review may still be desirable.

The first difficulty does not yield readily to any gadget, and certainly is not solved by delegation of the power to decide finality. As the views of the courts on the meaning of "final decisions" in multi-claims cases become more settled, rules to guide parties and judges may be expected to develop. In its negative aspect, Rule 54(b) eliminates the worst effect—uncertainty—of the finality test, since it gives the parties the notice needed to prevent a foreclosure of appeal.

The second difficulty may be met by providing discretion in the *courts of appeals* to review interlocutory orders. This will necessarily require a change in the jurisdictional statute. See *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 181, 99 L. Ed. 171, 175 (1955).

Proposals for greater flexibility and references to the need for statutory change have been made in many quarters, and by some of those most familiar with the problems, including members of this Court, members of Courts

of Appeals such as Judges Learned Hand and Frank, and legal scholars. See *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 263-264, 93 L. Ed. 1347, 1353 (1949); *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 516-517, 94 L. Ed. 299, 305 (1950); *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 181, 99 L. Ed. 171, 175 (1955); *AudiVision Inc.* v. *RCA Mfg. Co.*, 136 F. 2d 621, 625-628 (2d Cir. 1943); *Zalkind* v. *Scheinman*, 139 F. 2d 895, 898, note 3b (2d Cir. 1943); *Clark* v. *Taylor*, 163 F. 2d 940, 951-952, note 12 (2d Cir. 1947); *American Machine & Metals* v. *De Bothezat*, 173 F. 2d 890 (2d Cir. 1949); *Pabellon* v. *Grace Line*, 191 F. 2d 169, 179 (2d Cir. 1951); 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.43, pp. 288-292; Crick, "The Final Judgment Rule", 41 Yale L. Journ. 539, 564-565 (1932); Moore & Vestal, "Federal Appellate Procedure", 35 Va. L. Rev. 1, 45 (1949); Note, "Federal Rule 54(b) and the Final Judgment Rule", 28 N. Y. U. L. Rev. 203 (1953).

Several drafts of possible legislation have been formulated. These vary from giving the district court a power to certify, with or without discretion on the part of the court of appeals to accept, to a form of certiorari jurisdiction of courts of appeal akin to that of this Court. For example, one proposal contemplates a new "Section 1292A" in Title 28 of the United States Code, which would give the courts of appeals power to review interlocutory orders at their discretion in specified situations. Note, "Federal Rule 54(b) and the Final Judgment Rule", 28 N. Y. U. L. Rev. 203 (1953).

In September, 1953 the Judicial Conference of the United States reported a draft statute as follows:

> "Section 1292 of Title 28 of the United States Code is hereby amended by insertion of the letter (a) at the beginning of the section and adding at the

end thereof an additional sub-paragraph lettered (b) to read as follows:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, September 24-25, 1953, Washington, D. C., at p. 27; see discussion of this proposed statute in *Rieser* v. *Baltimore Ohio R. Co.*, — F. 2d —., 21 Fed. Rules Serv. 54b.4, Case 5 (2d Cir. June 9, 1955); 6 Moore, *Federal Practice* (2d ed. 1953), par. 54.43, pp. 290-292. Although this draft statute has been criticized with respect to the role of the district courts and the scope of discretion, it has been overall favorably regarded by those concerned with the problems of appeals jurisdiction.[13] The proposal of the Judicial Con-

[13] In fact, it has been suggested in several quarters in the past few years that the Judicial Conference is particularly qualified to deal with the appeals problem. See, e.g., Professor Herbert Wechsler's comment: "The problems of the circuit courts pose narrow issues, of which the final judgment rule suggests a prime example; changes in this area are rightly left to the initiative of the Judicial Conference, well-equipped to see the situation as a whole." Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 Law & Contemp. Probs. 216, 219 (1948); see also 6 Moore, Federal Practice (2d ed. 1953), par. 54.43, p. 291.

ference has been transmitted to the Committees on the Judiciary of the Senate and the House. 100 Cong. Rec. 1079, 1168 (1954).

If this Court should, however, adopt an interpretation of Rule 54(b) which gives discretion to trial judges, and which, in the view of some, cures the grievous ills of appellate jurisdiction, the impetus for a thoroughly considered change in the law of appellate jurisdiction may well be weakened accordingly. As the French aphorism observes, "Petty reforms are the enemies of major reforms".

This Court has noted only recently the practical conditions for statutory reform in this specific area. Referring to past legislative modifications of the finality rule, the Court declared, "the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." The Court continued:

> "When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction."

Reed, J., in *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 181, 99 L. Ed. 171, 175 (1955). The Court ended by reminding that it is "not authorized to approve or declare judicial modification. It is the responsibility of *all* courts to see that no unauthorized extension or reduction of jurisdiction, *direct or indirect*, occurs in the federal system." (Italics added). *Id.* at p. 181, (L. Ed., p. 175).

The substantial problems involved in a reform of appellate jurisdiction are problems for Congress. Proposed statutory measures are presently receiving consideration by some of the ablest members of the bench and bar. On the other hand, the problems are not and cannot be resolved by a strained interpretation of Rule 54(b).

CONCLUSION.

As the language and history of the amendment to Rule 54(b) emphasize, the Rule serves the purpose of definitely establishing when an order or decision is *not* final. But the forms prescribed by it cannot confer finality upon a decision which does not meet the standards of a "final decision" required by Congressional statutes as interpreted by the appellate courts. The appellate courts should remain the masters of their own jurisdiction under the law.

Therefore, the Court of Appeals below has erred in its self-denial. The decision of the Court of Appeals denying the motion to dismiss the appeal should be reversed, and the cause should be remanded for further hearing in that Court on the question whether the appeal meets the statutory test for appellate jurisdiction.

Respectfully submitted,

WALTER J. ROCKLER
Counsel for the Petitioner

LEO H. ARNSTEIN
HERBERT E. RUBEN
Of Counsel